* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**CRL.A. 474/2020**

Reserved on : 27.11.2020

Date of Decision : 03.12.2020

IN THE MATTER OF:

ALTAF AHMED @ RAHUL .... Appellant

Through: Ms. Richa Dhawan, Standing Counsel, DHCLSC.

Versus

STATE (GNCTD OF DELHI) ..... Respondent

Through: Ms. Meenakshi Chauhan, APP for State with SI Dharmendra Pratap Singh, P.S. Begumpur.

**CORAM:**
**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

**(VIA VIDEO CONFERENCING)**

**JUDGMENT**

**MANOJ KUMAR OHRI, J.**

1. The present appeal filed under Section 374(2) read with Section 383 Cr.P.C. on behalf of the appellant has been preferred against the judgment dated 30.11.2019 and order on sentence dated 10.12.2019 passed by the learned ASJ-04, Special Judge: POCSO Act, Rohini Courts, Delhi in Sessions Case No. 43/2017 in respect of FIR No. 247/2016 registered under Sections 5(m)/6 of the POCSO Act at P.S.

Begumpur whereby the appellant has been convicted for the offence punishable under Section 6 of the POCSO Act. Further, vide order on sentence dated 10.12.2019, the appellant has been sentenced to undergo RI for a period of 10 years along with payment of fine of Rs.10,000/-, in default whereof to further undergo SI for 30 days.

2. The brief facts, as noted by the trial court, are as follows:

> *"2. The case of the prosecution is that on 13.03.2016, FIR No. 247/2016 under Sections 376 IPC and under Section 4 of the POCSO Act was registered at P.S. Begumpur against the accused herein for committing penetrative sexual assault upon the victim on the complaint of mother of victim who stated therein that she is housewife and her husband ply electric rickshaw. She has three daughters and her elder daughter 'S' is 6 years old. On 12.03.2016 at about 06.30 pm S was playing with her younger sister in the gallery outside her room. She was lying in her room due to her ill health. After some time, S came to her along with her younger sister and went outside leaving her sister there. After some time, she heard the cry of her daughter S, she immediately came outside the room and saw her daughter coming while crying from the adjacent room and holding her pajami. After sometime Rahul who was present in the same room, came outside the room and went away. When she asked her daughter, she told that Rahul had called him inside his room and bolted the room from inside. He gagged her mouth and pulled down her underwear and pajama and spit on her vagina. Then he inserted his finger in her vagina. She cried due to pain, then Rahul left her and opened the door immediately. Her husband came late in the night and she was also not well that is why they could not come in the night of 12.03.2016. The statement of the victim under Section 164 Cr.P.C. was recorded wherein she corroborated the incident. After*

*completion of investigation, the charge-sheet was filed before the JJB as accused claimed himself to be juvenile. The JJB vide its order dated 13.01.2017 held that accused was not child on the date of commission of offence. Thereafter, the present case was assigned to this Court.*

*3. The charge-sheet has been filed u/s 376 IPC and u/s 4 of the POCSO Act against the accused namely Altaf Ahmed and after hearing arguments on the point of charge, charge for the offence punishable under Section 5(m) of POCSO Act was framed against the accused by the Ld. Predecessor of this Court to which he pleaded not guilty and claimed trial."*

3. Ms. Richa Dhawan, learned Standing Counsel, DHCLSC appearing on behalf of the appellant, has assailed the impugned judgment on the ground that the trial court failed to appreciate that the testimony of the child victim and her mother were not creditworthy as there were material improvements not only in the statements of the child victim but also, her mother Ms. 'RV'. It was also contended that the testimony of the child victim was also not creditworthy and admissible as the child victim was tutored. It was next contended that material witnesses were not examined. As per the prosecution case, although at the relevant time, the child victim was playing with her younger sisters but the sisters were not cited as witnesses. Also, the landlord of the premises was deliberately not cited as a witness. Lastly, it was also contended that there was no medical corroboration in as much as no blood stain or blood spot was observed on the underwear of the child victim during her medical examination.

4. Ms. Meenakshi Chauhan, learned APP for the State, on the other hand, has supported the impugned judgment. Learned APP submitted that the child victim had consistently stated about the offence committed by the appellant and that her testimony is both creditworthy and admissible. In support, reliance was placed on the decisions in Panchhi & Ors *v.* State of U.P. reported as **(1998) 7 SCC 177**; State of U.P. *v.* Krishna Master & Ors. reported as **(2010) 12 SCC 324** and Hari Om *v.* State (N.C.T.) reported as **2010 SCC OnLine Del 275.** She also stated that the statements of the child victim were corroborated by her MLC as during medical examination, her hymen was found to be partially torn. Lastly, it was submitted that the presumptions under Sections 29 and 30 of the POCSO Act were applicable against the appellant which he was unable to rebut.

5. I have heard learned counsel for the appellant as well as learned APP for the State and also perused the entire material placed on record including the TCR.

**MATERIAL WITNESSES**

6. In the trial, the prosecution examined total of 7 witnesses. The child victim was examined as PW1. Ms. 'RV', the mother of the child victim, was examined as PW2. The MLC of the child victim was proved by Dr. *Chesta* who was examined as PW6. The prosecution also examined SI *Raj Devi* as PW7 to prove the documents relating to the date of birth of the child victim. The appellant's age was proved by CW1 and CW2.

Age of the Child Victim

7. As per the prosecution case, at the time of offence, the child victim was aged about 6 years. During her in-court examination, the child

victim stated her age to be 7 years. Ms. 'RV', the mother of the child victim, deposed that her daughter was born on 26.05.2010. During the investigation, the age proof of the child victim was collected in the form of her MCD Birth Certificate which was exhibited as Ex.PW7/G. As per the aforesaid certificate, the date of birth of the child victim was mentioned as 26.05.2010. On the basis of the aforesaid document, the trial court came to the conclusion that since the offence in question was committed on 12.03.2016, the child victim was below the age of 12 years at the relevant time. Even during the course of arguments in the present appeal, the learned counsel for the appellant has not disputed the age of the child victim. Accordingly, this Court concurs with the findings of the trial court that the child victim was less than 12 years of age on the date of the offence.

8. In a trial involving examination of a child witness, the trial court is required to first record its satisfaction as to the competency of the child witness. For such purpose, the trial court needs to test the capacity of a child witness. It has been held in plethora of decisions that no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the Court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the Court

considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined. [Refer: P. Ramesh *v.* State reported as **2019 SCC OnLine SC 927**]

In the present case, it is seen that the trial court, after putting questions, correctly recorded its satisfaction as to the competency of the child victim.

9. It is a settled law that in case of rape, the finding of guilt can be recorded even on the basis of uncorroborated statement of the victim provided the same is cogent and relevant. Reference in this regard is made to the decision rendered by this Court in Ishwer Soni *v.* State (Govt. of NCT of Delhi) reported as **2020 SCC OnLine Del 1378**, wherein it has been held as under :-

> *"16. It is well settled that in a case of rape, the finding of guilt can be recorded even on the basis of uncorroborated testimony of the prosecutrix provided it is cogent and reliable. Reference in this regard is made to the decisions rendered by the Supreme Court in Vijay @ Chinee v. State of Madhya Pradesh reported as (2010) 8 SCC 191 and Rajinder @ Raju v. State of Himachal Pradesh reported as (2009) 16 SCC 69.*
>
> *17. So far as testimony of a child witness is concerned, it has to be evaluated even more carefully as the same is susceptible to tutoring. In State of Madhya Pradesh v. Ramesh & Anr. reported as (2011) 4 SCC 786, the Supreme Court held as under:*
>
> > *"14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require*

> *corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with grater circumspection because he is susceptible to tutoring. Only in case there is evidence or record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."*

*18. Similarly, in Ranjeet Kumar Ram v. State of Bihar reported as 2015 SCC OnLine SC 500, it was observed as under:-*

> *"14.... Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one..."*

ANALYSIS

10. To appreciate the contention raised by the learned counsel for the appellant as to the creditworthiness of the child victim and her mother, I deem it relevant to refer to their statements recorded during the investigation and at the time of their examination in court. The FIR was registered on the statement of the mother of the child victim. The child victim, in her statement recorded under Section 164 Cr.P.C., stated that on the day of the incident, the appellant pulled her. Then after pulling down her underwear, put his saliva on her urinary part and thereafter inserted his finger. She cried and her mother came.

11. At the time of her in-court examination, the child victim stated as follows:

> *"Mein ghar ke bahar khel rahi thi fir mein apni bahano i.e. D and R ke saath dukan par cheej lene gai they to dukan par mein TV dekh rahi to usi vakt, Rahul naam ne mujhe andar kamre main kheech liya aur mere mooh band kar liya aur meri kachhi utari aur fir usne thook lagaya aur mere shu shu wali jagah par apni ungli daal di aur fir usne meri shu shu wali jagah chatni shuru kar di aur mein rone lagi."*

In cross-examination, the child victim stated as under: -

> *"Ye kahana sahi hai ki ghar main mujhe padhai meri mummy karati hain aur exam ki preparation bhi mummy hi karati hain. Meine subah tayar hote vakt meri mummy se puchha ki mujhe kahan le kar jaa rahe ho aur kyo le kar jaa rahe ho. Ye kahana sahi hai ki mummy ne mujhe bata diya tha ki mujhe court main kya batana hai.*
>
> *Ye kahana galat hai ki hospital main doctor ko bhi mummy ne hi bataya tha ki mere saath kya hua tha.*
>
> *(Court question :- Hospital main doctor uncle ko ghatna ke bare main kisne bataya tha?*
> *Ans. Meine bataya tha)*
>
> *Hospital jaane se pahale meine mummy se puchha tha ki kahan le ja rahe ho aur kyo le jaa rahe ho.*
>
> *(Court question: Aapko kahan aur kyo ka farak maloom hai?*
> *Ans. Kyo ka matlab hai kahan le jaa rahe ho)*
>
> *Hospital jaane se pahle mummy ne mujhe bata diya tha ki doctor uncle ko kya batana hai.*
>
> *(Court question :- Jo aapne doctor uncle ko bataya aur jo aapne aaj court main bataya wo aapke saath hua tha ya aapki mummy ne ye batane ke liye kaha tha?*
> *Ans. Mere saath hua tha).*

*Ye kahana galat hai ki mere saath Rahul ne koi galat kaam nahin kiya."*

12. Ms. 'RV', the mother of the child victim, deposed that on the date of the incident, she was lying on a bed in her house as she was not feeling well. Her daughter was playing with her younger sisters i.e., 'R' and 'D'. After some time, the child victim left with 'R' and 'D' and went outside to play. After about 5 minutes, she heard the cries of the child victim. She went outside and saw that the child victim was holding her underwear and was weeping. On being asked, the child victim narrated the incident to her. The witness saw the appellant coming out of the room. On the next day, she lodged the complaint.

In her cross-examination, she admitted that she did not find any blood stains or blood spots on the clothes of the child victim. She also admitted that there was only a wall between their room and the appellant's room and if any noise was made, the same could be heard. She also stated that while lying on the bed, she was continuously watching the child victim playing with her younger sisters and she did not make any noise or sound when the appellant allegedly took the child victim with him. She admitted that though the appellant had been living there for some time but only about one and a half month prior to the incident, she came to the know that the appellant was a Muslim by religion. She however, denied the suggestion that the appellant was falsely implicated as she came to know that the appellant belongs to the Muslim community. She admitted that the appellant used to come late in the night and used to go to the shop of the landlord in the morning. She denied the suggestion that the complaint was not lodged on 12.03.2016 and the date of 13.03.2016 was deliberately chosen being a Sunday. She

stated that she wasn't aware if Sunday was an off day for the appellant. She volunteered that the appellant used to come back from the shop on Sunday to wash his clothes.

13. At this stage, I deem it apposite to the refer to the MLC as well as the 'history of assault' given by mother of the child victim at the time of recording of the MLC. The MLC of the child victim was proved by Dr. *Chesta* (PW6). She deposed that the child victim was brought to the hospital on 13.03.2016 by her mother and was examined by Dr. *Priyanka Kumari*. In the MLC, it was mentioned that the child victim had not changed her clothes or washed her genitals and her hymen was found partially torn.

At the time of recording of the MLC of the child victim, Ms. 'RV' while consenting for internal examination of the child victim also gave 'history of assault', as per which it was stated that after putting saliva in the urinary part of the child victim, the appellant lowered his pant and firstly fingered and then tried to do sexual intercourse. The appellant also gave her a Rs.10/- note. It was also stated that this was the second time as the appellant had also tried fingering one month back.

14. During investigation, the relevant exhibits were collected and sent to the FSL. As per the FSL Report (Ex.P2), it was opined that no blood or semen was detected on the Exhibits '2a' and '2b' i.e., clothes of the child victim.

15. A perusal of the statement of the child victim under Section 164 Cr.P.C. and her in-court examination would show that the child victim has slightly improved her version. While in her statement recorded under Section 164 Cr.P.C., she only stated that after pulling her in, the appellant pulled down her underwear and put his saliva in her urinary

part and also inserted his finger. However, in her statement recorded at the time of her in-court examination, she stated that while playing with her younger sisters outside her house, she went out with her sisters 'D' and 'R' to a shop. While she was watching TV in the said shop, the appellant took her inside the room and committed the offence. It was additionally stated thereafter, the appellant also licked her urinary part.

16. Ms. 'RV', in her first statement which resulted in registration of the FIR, stated that that while she was lying on a bed in her house, the child victim was playing outside and on hearing her crying, she went outside when the child victim narrated the incident to her that the appellant had pulled her in his room and then pulled down her *pajama* and underwear and put saliva and his finger in her urinary part. At the time of giving 'history of assault' recorded in the MLC, it was stated that the appellant after putting his saliva in the urinary part of the child victim firstly, put his finger and then tried to do sexual intercourse. He also gave a Rs. 10/- note to her. It was also stated that the present was a second incident and that about one month prior also, the appellant had tried fingering.

During her examination in-court, Ms. 'RV' deposed that after she was told about the incident by the child victim, she called her landlord and told him about the incident. The landlord told her that she would enquire from the appellant when he would come in the evening. On the next day, when the landlord did not state anything then she called her parents and made a complaint.

17. At this stage, I deem it apposite to refer to another aspect of the cross-examination of the child victim, wherein she had admitted that before coming to the Court, her mother told her as to what is to be stated

in the Court. While answering the Court questions, the child victim also stated that before being taken to the hospital, her mother had told her as to what is to be stated to the doctor. The creditworthiness and the admissibility of the statement of child victim and her mother is under challenge not only on the aspect of improvements but also on the aspect of tutoring. It is no longer res integra that the sole testimony of a child victim, before being accepted should be evaluated very carefully. It should be devoid of any embellishment, improvement or tutoring.

18. In Mangoo *v.* State of M.P. reported as **AIR 1995 SC 959**, the Supreme Court while dealing with the evidence of a child witness observed that the Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring. To the similar extent is the decision of the Supreme Court in Panchhi & Ors. (Supra) and Krishna Master (Supra).

19. In State of M.P. *v.* Ramesh & Anr. reported as **(2011) 4 SCC 786**, the Supreme court while referring to its earlier decisions, held as follows:

> *"14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an*

*inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."*

20. Again, in State of Madhya Pradesh *v.* Rajaram Alias Raja reported as **(2019) 13 SCC 516**, the Supreme Court while reiterating the above tests did not rely on the uncorroborated testimony of the child victim and upheld the judgment of acquittal.

21. In the present case, not only there are material improvements in the statements of the child victim and her mother but there are also material contradictions as already observed. Furthermore, the child victim categorically stated that she was told by her mother about what to say in the Court.

22. So far as corroboration in the form of MLC is concerned, it is noted that although the MLC records that the child victim's hymen was found partially torn but neither any injury nor any blood was noticed either in the vagina or on her clothes. It was specifically recorded that the child victim had not changed her clothes. Also, no opinion was given as to whether the partial hymen tear was fresh or old. Even as per the FSL report, no blood was detected on her clothes. In somewhat similar facts and circumstances, a Division Bench of this Court in Pappu *v.* State of Delhi reported as **2009 SCC OnLine Del 1642**, held as under:

*"26. We find merit in the last contention urged by learned Counsel for the appellant. Indeed, in the light of Medical Jurisprudence on the subject, it is apparent that Kumari 'M' was not subjected to any sexual assault at the time and on the date as claimed by the prosecution. The reason is obvious. Medical Jurisprudence evidences that in adolescent girls the hymen is situated relatively more posteriorly and for said*

*reason there is a possibility of rape being committed without the hymen being torn; the converse whereof would be that if the hymen of an adolescent girl is torn due to rape, the penetration has to be a deep penetration. The Medical Jurisprudence guides that the labia majora are the first to be encountered by the male organ and they are subjected to blunt forceful blows, depending on the vigour and the force used by the accused and counteracted by the victim. The narrowness of the vaginal canal makes it inevitable for the male organ to inflict blunt, forceful blows on the labia and such blows lead to contusion because of looseness and vascularity. The feature of such contusion is revealed against the pink background of the mucous membrane dark red contusion being evident to the naked eye. Had Kumari 'M' being raped between 5:00 p.m. and 7:00 PM and the hymen got torn due to said rape, fresh injuries on the labia majora, vaginal canal and around the hymen would have been evidenced as fresh bleeding injuries, and if not bleeding injuries, in the form of a dark red contusion being visible against the pink background mucous membrane.*

*27. If this be so, it assumes all the more significance that PW-1 has been found to be speaking half truths, as projected in the argument of learned Counsel for the appellant, with which we concur, and hence we did not re-note the same. That no blood was detected on the vaginal swabs of the prosecutrix and on her underwear totally belies the testimony of PW-1 that she saw blood on the underwear and the clothes*

*of the prosecutrix. That the prosecutrix admits that whatever she stated in the Court is at the behest of her mother is also suggestive of her being tutored and thus affords good ground to accept the defence taken by the appellant at the first instance i.e. of false implication…"*

23. Learned APP for the State placed reliance on the decision in Hari Om (Supra) however, a perusal of same reveals that the same does not apply to the facts of the present case.

24. So far as the contention by learned APP for the State with respect to presumption under Section 29 of the POCSO Act is concerned, it is no doubt true that in a trial under POCSO Act, the accused is liable to rebut the aforesaid presumptions against him. However, at the same time, for the said presumptions to come into play, the prosecution first has to establish the foundational facts by leading evidence. The presumption is rebuttable by either discrediting the witnesses through cross-examination or by leading defence evidence.

25. In light of the above discussion, this Court is of the opinion that the creditworthiness of the testimony of the child victim is in doubt. It cannot be said with certainty that her testimony does not suffer from the vice of tutoring. The testimony of the mother of the child victim is full of material improvements. There is no corroboration in the form of MLC or the FSL. In these circumstances, the appellant's false implication cannot be ruled out.

26. Resultantly, the appellant is granted benefit of doubt and his appeal is allowed. The impugned judgment and order on sentence, as referred to earlier, are set aside. The appellant is directed to be immediately set free if not required in any other case.

27. The appeal is disposed of in the above terms.

28. A copy of this order be communicated electronically to the appellant through the concerned Jail Superintendent as well as the trial court.

**(MANOJ KUMAR OHRI)**
**JUDGE**

**DECEMBER 03, 2020**
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